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NO. 1048

In the United States Court of Appeals for the

United States for the District of Columbia

Ja. 1948

PETITION FOR A Writ of Mandamus to the United States Court of Appeals for the District of Columbia for the Third Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA, PETITIONER

v.

JASPER WHITE

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

The Solicitor General prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Third Circuit which reversed a judgment of the District Court for the Middle District of Pennsylvania sentencing respondent to thirty days in jail for criminal contempt.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 20-25) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 24, 1943 (R. 26) and petition for rehearing was denied on June 18, 1943.

(R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a member of a labor union, responding to a grand jury subpoena duces tecum directed to the union, may refuse to comply with the subpoena on the ground that production of the records called for might tend to incriminate him.

(2) Whether the court below had jurisdiction when the appeal to it from a judgment of criminal contempt was taken by filing notice of appeal pursuant to the Criminal Appeals Rules and there was no application for appeal as required by Section 8 (e) of the Act of February 13, 1925.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment of the Constitution provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment provides in part:

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 8 (e) of the Act of February 13, 1925, 43 Stat. 940, 28 U. S. C. sec. 230, provides:

No writ of error or appeal intended to bring any judgment or decree before a

circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

STATEMENT

The United States District Court for the Middle District of Pennsylvania issued a subpoena duces tecum in December 1942 addressed to a labor union, Local No. 542, International Union of Operating Engineers, requiring it to produce certain of its books and documents before a grand jury of that court (R. 4-5). After service of this subpoena on the president of the union, respondent came before the grand jury on January 11, 1943, and stated that he was assistant supervisor of the union, that he appeared in response to the subpoena issued to the union, and that he had brought with him the books and records specified in the subpoena (R. 2-3). He refused, however, to produce these documents on the ground that they might tend to incriminate the union, "myself as an officer thereof, or individually" (R. 3). He further claimed immunity on behalf of the union and on his own behalf under the Fourth and Fifth Amendments to the Constitution (*ibid.*).

A written presentment filed by the grand jury charging respondent with being a contumacious witness and requesting his punishment (R. 1-2)

came on for hearing before the district court on January 14, 1943 (R. 6). The court, after hearing argument, ordered respondent to produce the subpoenaed papers before the grand jury (R. 7-10). Upon his refusing to do so on the same grounds as those given before the grand jury, the court adjudged him in contempt and sentenced him to imprisonment for 30 days (R. 6-7).

Respondent, who was released on bail, did not apply for allowance of appeal but gave notice of appeal under Rule 3 of the Criminal Appeals Rules (R. 17-18). In its opinion the court below said that the right of a witness to refuse to produce documents upon the ground that they tend to incriminate him is limited to those which are his own and that the subpoenaed documents were those of the union (R. 22). The court nevertheless held that the books and records of a labor union are also the property of its individual members and that respondent was entitled to claim the privilege against self-incrimination if he was a union member and if the subpoenaed documents would tend to incriminate him (R. 22). The court accordingly reversed the judgment of contempt and remanded the case to the district court with directions to sustain respondent's claim of privilege if the district court found that respondent was a union member and that the subpoenaed documents did tend to incriminate him (R. 23).

Circuit Judge Biggs dissented (R. 23-25) on the ground that labor unions "today operate as entities" and their members "do not function as individuals in relation to the public" and that the law "should not extend to the records of such bodies, or to those of any other unincorporated association which functions as an entity, a privilege hitherto zealously restricted to an individual who claims the privilege [against self-incrimination] expressly on his own behalf" (R. 25).

The Government filed a petition for rehearing raising for the first time the question whether the court had jurisdiction to hear respondent's appeal (R. 26-31). This petition was denied without opinion (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

- (1) In holding that a member of a labor union may assert a constitutional privilege against self-incrimination in respect of subpoenaed books and records of the union.
- (2) In reversing the judgment of the district court sentencing respondent for contempt of court.
- (3) In remanding the case to the district court with instructions to sustain respondent's claim of privilege if the district court should find that respondent was a member of the union and that the subpoenaed union records tended to incriminate him.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of constitutional law which has not been, but should be, settled by this Court, namely, whether an officer of a labor union, who is also a member, is entitled to refuse to produce books and records of the union upon the ground that they might incriminate him.

This Court has held that to compel an individual to produce his "private" books and papers for the purpose of connecting him with a crime is to compel him to be a witness against himself, in violation of the Fifth Amendment, and is, by virtue of this fact, an "unreasonable" search and seizure prohibited by the Fourth Amendment. *Boyd v. United States*, 116 U. S. 616. But, to apply the language of *Essgee Co. v. United States*, 262 U. S. 151, 158, an officer of a labor union does not hold its books and papers "in his private capacity and is not, therefore, protected against their production or against a writ requiring him as an agent of the corporation [union] to produce them." The court below, recognizing that respondent could assert the constitutional privilege against self-incrimination only if the subpoenaed documents were his own, held that the books and records of an unincorporated association such as a labor union are the private property of each of its members and that any member may rightfully refuse to produce the union

books upon the ground that they tend to incriminate him personally.

The Government submits that this holding that labor unions have no separate and distinct entity ignores the fact that their members—frequently numbered in the thousands and constantly fluctuating—do not function as individuals in their relation to the public. It ignores the fact that the law has widely recognized that the unions are independently functioning entities. As the dissenting opinion below points out (R. 24), members of labor unions do not generally have the power to select their fellow members, an officer who converts union funds may be convicted of larceny, and federal legislation has conferred substantial privileges upon labor unions and has also subjected them to certain restrictions.¹ See *United*

¹ By the National Labor Relations Act (sec. 8, 29 U. S. C. sec. 158), unions are protected against interference, restraint, or coercion by employers of labor. By the same act (sec. 9, 29 U. S. C. sec. 159), a federal agency determines, in case of dispute, what union the employees have selected as their collective-bargaining representative. By the Norris-LaGuardia Act (sec. 8, 29 U. S. C. sec. 103), every undertaking or promise in a contract of employment not to join or not to remain a member of a labor union is declared to be contrary to the public policy of the United States and is denied enforcement in any court of the United States. The Clayton Act (sec. 6, 15 U. S. C. sec. 17), provides that labor unions are not to be held illegal combinations in restraint of trade and that their members, in carrying out the "legitimate objects thereof," shall be exempt from federal antitrust laws. The so-called Anti-Racketeering Act of June 18, 1934 (sec. 6, 18 U. S. C. sec. 4201) provides that the acts shall not be applied so as to

Mine Workers of America v. Coronado Coal Co.,
259 U. S. 344, 386-391.

While we think that the decision below must be reversed if this Court determines that, for the purpose of the constitutional privilege against self-incrimination, the records of a labor union are not the personal papers and effects of each and every member, decisions dealing with the claim of personal self-incrimination set up by officers of corporations in opposition to the production of corporate records in their custody have rejected the claim upon a further and somewhat broader ground. In such cases this Court has said that corporations hold their books and records subject to a reserved visitatorial power by the State and by the National Government; that a corporation therefore may not resist production upon the ground of self-incrimination; that an officer of a corporation, in assuming custody of its records, accepts the same obligation to produce which rests on his principal; and that he there-

diminish or affect in any manner the rights of bona-fide labor unions in lawfully carrying out their legitimate objects.

As to specific restrictions imposed on labor unions by federal legislation, see Section 9 of the War Labor Disputes Act of June 25, 1943 (Public Law No. 89, 78th Cong.), providing that no labor union shall make a contribution in connection with any election of a member of Congress or in connection with any presidential election.

If it were relevant to consider the facts concerning the structure of the particular union to which respondent belongs, such an inquiry is not open under the order of remand by the court below.

fore cannot assert any "personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *Wilson v. United States*, 221 U. S. 361, 377-385.²

The Government submits that this broader ground of decision likewise applies in the case of an officer of a labor union who resists, upon the ground of personal self-incrimination, a subpoena calling for the production of books and records of the union. We believe that rights conferred upon labor unions by federal legislation (n. 1, *supra*; pp. 7-8) have impressed their books and records, so far as visitorial inspection by the Federal Government is concerned, with a quasi-public character which removes them from the category of the "private" books and property which are given protection on the score of self-incrimination.

The issue is not peculiar to labor unions. Any decision rendered on review would probably be controlling in the case of other kinds of unincorporated associations. It is significant in this regard that most of the leading cases under the Sherman Act have required investigation and examination of the files of unincorporated trade associations.

2. The decision below is believed to be in conflict with the decision of the Circuit Court of

² See also *Wheeler v. United States*, 226 U. S. 478, 489-490; *Ulric v. United States*, 227 U. S. 131, 142-143.

Appeals for the Seventh Circuit in *Davis v. Federal Securities and Exchange Commission*, 109 F. (2d) 6, certiorari denied, 309 U. S. 687. That case held that the records of an unincorporated association, obtained by subpoena served upon one of its members,³ could be used in evidence against such member. The court, in rejecting the defendant's contention that he was subjected to an unreasonable search and seizure and compelled to be a witness against himself in violation of the Fourth and Fifth Amendments, said (p. 8) that the records of the unincorporated association were not "personal to" the defendant, and could "properly be brought into court by subpoena and used as evidence against an officer or agent thereof."

The decision below is in conflict with several district court decisions holding that no privilege conferred by the Fourth or Fifth Amendment authorizes an officer of a labor union to refuse to produce the union books and records upon the ground of self-incrimination. *United States v. Greater New York Live Poultry Chamber of Commerce*, 34 F. (2d) 967, 968 (S. D. N. Y.); *In re Local Union No. 550, United Brotherhood*,

³ The court said (p. 8) that there was conflict in the evidence as to whether the subpoena was served upon the member or his secretary but that it regarded this question as immaterial. The court noted that response to the subpoena was by the member's secretary; but the significance accorded that fact is not clear.

of Carpenters and Joiners of America, 33 F. Supp. 544 (N. D. Calif.); *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 533-534 (E. D. Ill.); *United States v. Lumber Products Assn.*, 42 F. Supp. 910, 916 (N. D. Calif.). In the *Goedde* case the court, after stating that unincorporated associations "constitute, in view of the law, separate legal entities" and that their papers "belong to the separate entity" and "are in no wise the papers of each of the members," said (p. 534):

No immunity can be claimed by any individual because of the contents of documents of a third person, including an association. Furthermore, the individual officials have no right to complain if they produce papers of the association which they hold not in their private capacity but as officials of the separate legal entities.

The understanding evidenced by these district court decisions, contrary to the decision below, furnishes additional reason for the granting of certiorari. Compare *United States v. Constantine*, 296 U. S. 287, 290.

3. Although the decision below remands the case to the district court and hence is not final, there is grave doubt whether a subsequent appeal will be available to the Government, and the appropriateness of certiorari is therefore not diminished by the posture of the case. Cf. *United States v. Dotterweich*, pending on certiorari.

tari, No. 5, present Term. The rule that the Government has no appeal from a judgment of acquittal in criminal cases, applies to criminal contempt. *United States v. Bittner*, 11 F. (2d) 93, 95 (C. C. A. 4). If the Government were to have an appeal from a judgment for respondent, it could only rest on the Criminal Appeals Act, which provides a direct appeal to this Court from a judgment sustaining a special plea in bar where the defendant has not been put in jeopardy. Self-incrimination may perhaps be asserted by a special plea in bar within the Criminal Appeals Act (*United States v. Murdock*, 284 U. S. 141); but where, unlike the *Murdock* case, the proceeding is for contempt of court by reason of the defendant's refusal to produce subpoenaed documents, the defense that the refusal was justified because of the incriminating character of the documents would seem to go to the merits of the issue and the defendant would seem to be put in jeopardy when the cause was submitted to the court for its ruling on this issue.⁴ In any event the present respondent has clearly been put in jeopardy, since he has actually been sentenced for contempt of court.

⁴ In the *Murdock* case itself, where the defendant was indicted under a section of the Revenue Act penalizing the wilful failure to supply information required by the law or regulations, this Court said (284 U. S. at 149-151) that the proper practice was to try the defense of self-incrimination under the general issue and that the district court should have refused leave to file the plea of self-incrimination.

Nor is it likely that the Government will be in a position to bring the decision below before this Court for review if the district court resentences respondent for contempt after finding either that he was not a member of the union or that the subpoenaed documents were not incriminating. An appeal by respondent from such a purely factual determination appears most unlikely.

The decision below, if not reviewed by this Court, will be controlling on the district courts in the Third Circuit and, as the latest and most authoritative decision on the subject, may well be followed by district courts in other circuits. Accordingly, if the present petition for certiorari is not granted, the decision below may lead to important rulings adverse to the Government which it may be unable to have reviewed either by the applicable circuit court of appeals or by this Court.

4. A question relating to the jurisdiction of the circuit court of appeals is presented. In *Nye v. United States*, 313 U. S. 33, appeal from a judgment for criminal contempt was taken by filing notice of appeal, and no application for appeal was made. The same procedure was followed in this case. This Court held in the *Nye* case that appeal from such a judgment is governed by Section 8 (c) of the Act of February 13, 1925, and not by the Criminal Appeals Rules; but the Court (p. 44) was equally divided in opinion as

to whether the circuit court of appeals nevertheless could assume jurisdiction in the absence of an application for allowance of the appeal. The Government in the present case is chiefly concerned with the decision of the court below on the merits. The question of the jurisdiction of that court is, however, raised by the record and is one of importance which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.